

DECISION



25734 ^{E-4767}
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-206442.2

DATE: July 13, 1983

MATTER OF: Linde Construction -- Reconsideration

DIGEST:

1. Request for reconsideration of decision on procurement by local housing authority generally must meet standard set forth in GAO Bid Protest Procedures: complainant must either show factual or legal grounds warranting reversal or modification of decision, or must present information not previously available and therefore not considered by GAO.
2. When alleged factual error in number of proposed subcontractors, pointed out in request for reconsideration, does not change the fact that bidders proposed to subcontract extensively, GAO will affirm decision holding that local housing authority reasonably considered subcontractor hiring records in determining whether bidders could meet minority hiring goals.
3. As a matter of policy, GAO generally will not review an affirmative determination of responsibility in connection with a procurement by a local housing authority. In addition, whether the successful contractor complies with minority hiring goals is a matter of contract administration, and is primarily the responsibility of the local housing authority, with oversight by HUD.
4. When local housing authority has provided bidder numerous opportunities to demonstrate ability of proposed subcontractors to meet

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minority hiring goals, but information is not forthcoming within reasonable time, authority may reject bidder as nonresponsible. Bidder's presentation of additional information during development of complaint to GAO does not affect reasonableness of nonresponsibility determination.

Linde Construction requests reconsideration of our decision concerning the rejection of its bid for construction of 42 units of new, scattered-site public housing under a solicitation issued by the Housing Authority of Omaha, Nebraska. See Linde Construction, B-206442, March 17, 1983, 83-1 CPD 271. We affirm that decision.

The project in question is receiving Federal financial assistance in the form of loans and annual contributions from the Department of Housing and Urban Development (HUD), pursuant to the United States Housing Act of 1937, as amended, 42 U.S.C. §§ 1437b (1976) and 4437c (Supp. IV 1980).

In our March decision, we found that the Housing Authority reasonably had rejected the two lowest bids, including Linde's, which was second-low, because the bidders failed to demonstrate the ability of their proposed subcontractors to meet solicitation goals for hiring women and minorities. The Housing Authority required either evidence of previous employment of these groups or documents showing that the subcontractors were new, family-operated, or small businesses, and therefore exempt from the requirements. Such evidence was to be provided before award.

We found that the Housing Authority had offered Linde numerous opportunities, both through correspondence and at a public meeting, to provide this information. When it had not been forthcoming in sufficient detail, the Housing Authority, we concluded, properly awarded a contract to the third-low bidder, F&H Construction Company. Linde challenges this conclusion, referencing numerous documents submitted to our Office during development of its complaint and stating that it wishes to clarify them.

At the outset, we note that our Bid Protest Procedures, 4 C.F.R. Part 21 (1983), which involve direct Federal procurements, do not apply per se to procurements by local housing authorities that have annual contributions contracts with HUD; the status of a local housing authority is similar to that of a Federal grantee. Nevertheless, the basis for reconsideration of a decision on a procurement by a local housing authority or a grantee should, in our opinion, generally be the same as that set forth in section 21.9 of our procedures: the complainant must either show factual or legal grounds warranting reversal or modification of the decision, or must present information not previously available, and therefore not considered by our Office. See, e.g., The Harris Corporation - Reconsideration, B-194151, July 16, 1980, 80-2 CPD 31, aff'd October 14, 1980, 80-2 CPD 271 (involving a grantee's interpretation of state law).

In this case, Linde does not argue that our March decision contains any errors of law, but points out what it believes is an error of fact. We stated that Linde proposed using approximately 25 subcontractors; according to Linde, the correct total was 16. While one document submitted for the record by HUD lists 16 subcontractors (9 of which the Housing Authority did not approve) an October 26, 1982 letter from Linde to the Housing Authority, also included in the record, identifies more than 25 firms as tentative subcontractors and suppliers. Our point was that since Linde and other bidders had proposed to subcontract extensively, it was reasonable for the Housing Authority to consider subcontractor hiring records before award. Even if we accept the fact that Linde proposed only 16 subcontractors, our conclusion as to the reasonableness of the Housing Authority's decision to review their hiring records is not changed.

In both its original complaint and its request for reconsideration, Linde makes a number of arguments that, as a matter of policy, we will not review. For example, Linde contends that F&H did not, in its opinion, demonstrate that its proposed subcontractors previously had hired women and minorities. As we pointed out in our March decision, the entire question of ability to meet minority hiring goals is

a matter of bidder responsibility, since it concerns how the contract will be performed. In direct Federal procurements, our Office will not review a contracting officer's affirmative determination of responsibility unless the protester can show possible fraud by Government officials or failure to apply definitive responsibility criteria. Service & Sales, Inc., B-210137, May 16, 1983, 83-1 CPD 514. This is because a decision as to a prospective contractor's ability to perform is largely a matter of judgment. While it should be based on fact and reached in good faith, it is properly left to the contracting agency, which must bear the brunt of any difficulties encountered during performance and must maintain day-to-day relations with the contractor. Bradley Construction, Inc., B-206152, January 24, 1983, 62 Comp. Gen. ___, 83-1 CPD 76.

Here, the Housing Authority affirmatively determined that F&H was responsible. Since neither of the exceptions applicable to direct Federal procurements was present, for the same policy reasons we did not consider Linde's allegation initially and will not do so now.

Linde further alleged that after construction had begun, Omaha newspapers reported that the Housing Authority had notified F&H that it was "unhappy" with the low number of minority workers on the new housing sites. We did not review this allegation, since whether and to what extent the successful contractor complies with minority hiring goals is a matter of contract administration, and also is primarily the responsibility of the Housing Authority, with oversight by HUD. Cf. L & L Electrical Service, Inc., 61 Comp. Gen. 131 (1981), 81-2 CPD 466 (a decision on a grant complaint).

Some of Linde's other allegations were not considered at length because they were untimely, having been made for the first time in comments on HUD's report to our Office, more than 8 months after the Housing Authority rejected Linde's bid. See O.K. Lumber Company, Inc., B-209741, February 17, 1983, 83-1 CPD 165. Linde objects to our describing this filing as "piecemeal," but does not deny that the bases of complaint arose with the alleged improper rejection.

To the extent that we did consider Linde's allegation that the head of the Housing Authority's construction committee exhibited bias against Linde's non-union subcontractors, we found it without legal merit, since the entire Housing Authority had selected the successful contractor. Linde repeats this allegation in its request for reconsideration, but provides no further substantiation.

The remainder of the request for reconsideration is a further attempt to establish that both Linde and all of its proposed subcontractors are responsible, and that the subcontractors either previously had employed women and minorities or were within one of the exceptions set forth in the solicitation. As we noted in our March decision, the Housing Authority did not find to the contrary. Rather, lack of information and documentation--that Linde was responsible for but failed to provide--prevented the Housing Authority from approving the proposed subcontractors.

As noted above, we found that the Housing Authority had given Linde numerous opportunities to provide the information before proceeding with award. That Linde presented additional information to our Office does not change the fact that, on the basis of the documentation available to it at the time, the Housing Authority could not find Linde's proposed subcontractors responsible. We will not disturb this determination, since it has a reasonable basis. See Bradley Construction, Inc., supra.

Our prior decision is affirmed.

for Harry D. Van Cleave
Comptroller General
of the United States